

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

RODNEY LEVETT BARTLETT,
 Plaintiff(s),
 v.
 KILOLO KIJAKAZI,
 Defendant(s).

Case No. 2:21-cv-01579-NJK

ORDER

[Docket Nos. 18, 20]

This case involves judicial review of administrative action by the Commissioner of Social Security (“Commissioner”) denying Plaintiff’s application for disability insurance benefits pursuant to Title II of the Social Security Act. Currently before the Court is Plaintiff’s Motion for Reversal and/or Remand. Docket No. 18. The Commissioner filed a response in opposition and a cross-motion to affirm. Docket Nos. 20-21. Plaintiff filed a reply. Docket No. 22.

The parties consent to resolution of this matter by the undersigned magistrate judge. *See* Docket No. 3; *see also* Gen. Order 2019-08.

I. BACKGROUND

A. Procedural History

On May 2, 2018, Plaintiff filed an application for disability insurance benefits with an alleged disability onset date of August 16, 2015. *See, e.g.*, Administrative Record (“A.R.”) 356-59. On November 27, 2018, Plaintiff’s claim was denied initially. A.R. 252. On January 30, 2019, Plaintiff’s claim was denied on reconsideration. A.R. 265. On February 11, 2019, Plaintiff filed a request for a hearing before an administrative law judge. A.R. 286-87. On September 9, 2020, Plaintiff, Plaintiff’s representative, and a vocational expert appeared for a hearing before ALJ Jane Maccione. *See* A.R. 200-38. On November 18, 2020, the ALJ issued an unfavorable decision finding that Plaintiff had not been under a disability since the date the

1 application was filed. A.R. 26-46. On July 7, 2021, the ALJ's decision became the final decision
2 of the Commissioner when the Appeals Council denied Plaintiff's request for review. A.R. 6-12.

3 On August 26, 2021, Plaintiff commenced this action for judicial review. Docket No. 1.

4 **B. The Decision Below**

5 The ALJ's decision followed the five-step sequential evaluation process set forth in 20
6 C.F.R. § 404.1520. A.R. 31-40. At step one, the ALJ found that Plaintiff met the insured status
7 requirement through September 30, 2017, and had not engaged in substantial gainful activity since
8 the application date through the date last insured. A.R. 31. At step two, the ALJ found that
9 Plaintiff had the following severe impairments: degenerative disc disease of the lumbar spine,
10 partial rotator cuff tear of the right shoulder, osteoarthritis and medial meniscal tear of the right
11 knee, and obstructive sleep apnea. A.R. 32-33. At step three, the ALJ found that Plaintiff did not
12 have an impairment or combination of impairments that meets or medically equals the severity of
13 one of the listed impairments in 20 C.F.R. Part 404, Subpart P, Appendix 1. A.R. 33-34. The ALJ
14 found that Plaintiff has the residual functional capacity to:

15 perform light work as defined by 20 C.F.R. § 404.1567(b), except
16 that he was able to climb ramps and stairs frequently; he could not
17 climb ropes, ladders, or scaffolds. He was able to balance frequently
18 and to stoop, kneel, crouch and crawl occasionally. The claimant
19 was able to reach frequently in all directions with his right,
dominant, upper extremity. He needed to avoid concentrated
exposure to vibration. In addition, the claimant required protection
from workplace hazards, such as unprotected heights and dangerous
moving mechanical moving parts.

20 A.R. 34-39. At step four, the ALJ found Plaintiff capable of performing past relevant work as an
21 inventory clerk and appointment clerk. A.R. 39-40.

22 Based on all of these findings, the ALJ found Plaintiff not disabled. A.R. 40.

23 **II. STANDARDS**

24 The standard for determining disability is whether a social security claimant has an
25 "inability to engage in any substantial gainful activity by reason of any medically determinable
26 physical or mental impairment which can be expected . . . to last for a continuous period of not
27 less than 12 months." 42 U.S.C. § 423(d)(1)(A); *see also* 42 U.S.C. § 1382c(3)(A). That
28 determination is made by following a five-step sequential evaluation process. *Bowen v. Yuckert*,

482 U.S. 137, 140 (1987) (citing 20 C.F.R. §§ 404.1520, 416.920). The first step addresses whether the claimant is currently engaging in substantial gainful activity. 20 C.F.R. §§ 404.1520(b), 416.920(b).¹ The second step addresses whether the claimant has a medically determinable impairment that is severe or a combination of impairments that significantly limits basic work activities. 20 C.F.R. §§ 404.1520(c), 416.920(c). The third step addresses whether the claimant's impairments or combination of impairments meet or medically equal the criteria of an impairment listed in 20 C.F.R. Part 404, Subpart P, Appendix 1. 20 C.F.R. §§ 404.1520(d), 404.1525, 404.1526, 416.920(d), 416.925, 416.926. There is then a determination of the claimant's residual functional capacity, which assesses the claimant's ability to do physical and mental work-related activities. 20 C.F.R. §§ 404.1520(e), 416.920(e). The fourth step addresses whether the claimant has the residual functional capacity to perform past relevant work. 20 C.F.R. §§ 404.1520(f), 416.920(f). The fifth step addresses whether the claimant is able to do other work considering the residual functional capacity, age, education, and work experience. 20 C.F.R. §§ 404.1520(g), 416.920(g).

After exhausting the administrative process, a claimant may seek judicial review of a decision denying social security benefits. 42 U.S.C. § 405(g). The Court must uphold a decision denying benefits if the proper legal standard was applied and there is substantial evidence in the record as a whole to support the decision. *Webb v. Barnhart*, 433 F.3d 683, 686 (9th Cir. 2005). Substantial evidence is "more than a mere scintilla," which equates to "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Biestek v. Berryhill*, ___ U.S. ___, 139 S.Ct. 1148, 1154 (2019). "[T]he threshold for such evidentiary sufficiency is not high." *Id.*

III. ANALYSIS

Plaintiff raises a single issue on appeal. Two state agency consultants found that Plaintiff could only occasionally reach overhead, in front, and laterally with the right upper extremity. A.R. 246, 261. The ALJ did not adopt that finding and, instead, concluded that Plaintiff could "reach

¹ The five-step process is largely the same for both Title II and Title XVI claims. For a Title II claim, however, a claimant must also meet insurance requirements. 20 C.F.R. § 404.130.

1 frequently in all directions with his right, dominant, upper extremity.” A.R. 34. Plaintiff argues
2 that the ALJ erred by doing so. Mot. at 6-10; *see also* Reply at 3-5. The Commissioner counters
3 that the ALJ’s finding was supported by the record and free from legal error. Resp. at 4-12.

4 A. Applicable Regulations

5 For claims filed on or after March 27, 2017, the Court reviews an ALJ’s evaluation of
6 medical opinions based on the new regulations promulgated. *See* Revisions to Rules Regarding
7 the Evaluation of Medical Evidence, 82 Fed. Reg. 5844, 5844 (Jan. 18, 2017). Under these
8 regulations, the persuasiveness of a medical opinion is based on (1) supportability, (2) consistency,
9 (3) relationship with the claimant, (4) specialization, and (5) “other factors.” 20 C.F.R. §
10 404.1520c(a)-(c). “[A]n ALJ cannot reject an examining or treating doctor’s opinion as
11 unsupported or inconsistent without providing an explanation supported by substantial evidence.
12 The agency must articulate . . . how persuasive it finds all of the medical opinions from each doctor
13 or other source, and explain how [it] considered the supportability and consistency factors in
14 reaching these findings.” *Woods v. Kijakazi*, 32 F.4th 785, 792 (9th Cir. 2022) (internal citations
15 and quotations omitted).

16 B. Application

17 In this case, two agency consultants found that Plaintiff could only occasionally reach
18 overhead, in front, and laterally. A.R. 246, 260-61. Although the ALJ considered the findings of
19 these consultants persuasive in many respects, the ALJ did not consider them persuasive on this
20 particular issue. A.R. 37-38. The ALJ determined that the consultants’ finding was (1) not
21 consistent with the medical record; (2) not consistent with Plaintiff’s failure to exhaust
22 conservative treatment options for his right shoulder; and (3) not consistent with the conservative
23 nature of the treatment received. A.R. 37-38. Instead, the ALJ determined that Plaintiff could
24 “reach frequently in all directions with his right, dominant, upper extremity.” A.R. 34. The ALJ
25 did not err in so concluding.

26 With respect to the first consideration, the ALJ relied on a number of exhibits in the medical
27 record that were inconsistent with the finding of the state agency consultants. A.R. 38. The record
28 includes multiple medical examinations that evidence a normal range of motion and no pain in

1 Plaintiff's right upper extremity. The record from Plaintiff's physical examination on September
 2 1, 2017, states that his right upper extremity had "range of motion *normal* [and] *no pain* with joint
 3 motion." A.R. 632 (emphasis added). The record from Plaintiff's physical examination on April
 4 5, 2017, similarly indicates that his right upper extremity had "*range of motion normal, no . . .*
 5 *pain* with motion present." A.R. 648 (emphasis added). Plaintiff does not address these aspects
 6 of the record or provide meaningful argument as to how the ALJ could have erred in relying on
 7 them in finding that Plaintiff can reach frequently. The Court does not find error in the ALJ's
 8 conclusion that the record was inconsistent the finding of the state agency consultants that Plaintiff
 9 could reach only occasionally. *Cf. Ford v. Saul*, 950 F.3d 1141, 1159 (9th Cir. 2020) (noting
 10 "deferential" nature of the substantial evidence review).

11 With respect to the failure to pursue conservative treatment options, it has long been clear
 12 that an ALJ may consider a claimant's unexplained or inadequately explained failure to seek
 13 treatment. *See, e.g., Bunnell v. Sullivan*, 947 F.2d 341, 346 (9th Cir. 1991) (en banc).²
 14 Nonetheless, Plaintiff contends that the ALJ failed to specify the forms of treatment that she would
 15 have expected for a claimant asserting disability. Docket No. 18 at 9. Plaintiff is wrong. The ALJ
 16 specifically referenced the medical record showing that Plaintiff's treatment did not include
 17 chiropractic care, acupuncture, message therapy, or a TENS unit.³ *See* A.R. 38 (citing Exhibit
 18 20F/6); *see also* A.R. 780 (Exhibit 20F/6). Plaintiff has advanced no meaningful argument
 19 addressing his failure to pursue these treatment options and the ALJ's reliance thereon.⁴ The Court
 20 does not find error.

22 ² This reasoning is advanced most frequently in the context of an ALJ discounting a
 23 claimant's own testimony. Plaintiff has not argued in this case that an ALJ cannot rely on this
 24 reasoning with respect to medical findings. Any such argument has been waived. *See Sandgathe*
 25 *v. Chater*, 108 F.3d 978, 980 (9th Cir. 1997) (per curiam); *see also Rameriz v. Comm'r of Soc.*
Sec., 2012 WL 5328624, *4 (E.D. Cal. Oct. 29, 2012) (any arguments not specifically and
 distinctly made in challenging ALJ's findings in the district court are deemed waived).

26 ³ "TENS unit" refers to a nerve stimulation used to treat pain. *E.g., Bates v. Colvin*, 736
 F.3d 1093, 1096 n.2 (7th Cir. 2013).

27 ⁴ Without meaningful elaboration, Plaintiff relies on a notation in the record from 2015 that
 28 he felt pain the days he underwent physical therapy. Mot. at 8 (citing A.R. 857). Plaintiff has not
 advanced any meaningful argument, however, that such notation explains why he did not, *inter*
alia, use a TENS unit or get massages for his shoulder.

1 With respect to the conservative nature of the treatment received, Plaintiff argues that the
 2 ALJ's finding was not supported by substantial evidence because Plaintiff received injections and
 3 took opioids. *See* Mot. at 8 & n.5. Courts within the Ninth Circuit (including this one) have
 4 rejected similar contentions that the existence in a course of treatment of narcotics and/or injections
 5 establishes error with respect to a finding of conservative treatment. *See Pederson v. Berryhill*,
 6 2019 WL 5295538, at *6 (D. Nev. Mar. 21, 2019); *see also Aurelio A. v. Saul*, 2020 WL 10321754,
 7 at *10 (S.D. Cal. Oct. 28, 2020) (collecting cases). The Court is similarly unpersuaded here by
 8 Plaintiff's sweeping contention that substantial evidence did not support the ALJ's finding that the
 9 treatment received was conservative in nature.⁵

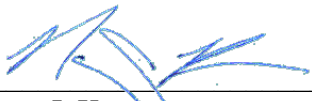
10 In short, the ALJ did not err in crafting a residual functional capacity that Plaintiff can
 11 "reach frequently in all directions with his right, dominant, upper extremity" notwithstanding the
 12 agency findings to the contrary.

13 IV. CONCLUSION

14 Accordingly, the Court **DENIES** the motion for reversal or remand (Docket No. 18) and
 15 **GRANTS** the countermotion to affirm (Docket No. 20). The decision below is **AFFIRMED**. The
 16 Clerk's Office is instructed to **ENTER FINAL JUDGMENT** and to **CLOSE** this case.

17 IT IS SO ORDERED.

18 Dated: June 21, 2022

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 20 _____
 Nancy J. Koppe
 United States Magistrate Judge

21
 22 ⁵ Plaintiff argues that the ALJ erred in discussing two injections, when he actually received
 23 five. Mot. at 7-8. Plaintiff bears the burden of establishing harmful error, *see, e.g., Shinseki v.*
 24 *Sanders*, 556 U.S. 396, 409 (2009), which is satisfied by showing that the error was not
 25 "inconsequential to the ultimate nondisability determination," *Marsh v. Colvin*, 792 F.3d 1170,
 26 1173 (9th Cir. 2015). Plaintiff has not established the harmfulness of any error with respect to the
 27 number of injections. Plaintiff also argues that the ALJ erred in failing to consider a surgery
 28 consult predating the alleged onset date. Mot. at 9. Plaintiff has not shown that consideration of
 a surgical consult that was not acted upon from before the onset date would be consequential to
 the nondisability finding. Lastly, Plaintiff argues that the ALJ failed to consider the opioids that
 he was taking. Mot. at 6-7. This argument is unavailing given that the ALJ explicitly referenced
 the medical record identifying these opioids in finding the treatment to be conservative in nature.
 A.R. 36 (citing, *inter alia*, Exhibit 5F/1); *see also* A.R. 488 (Exhibit 5F/1, indicating that Plaintiff
 was taking Soma and Oxycodone). At any rate, Plaintiff has not shown that his taking opioids
 would alter the outcome.